IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

OPAL CHABRIER, DONALD LAMUTIS and STEVEN TURNER, individually and on behalf of all others similarly situated	**:**	**CIVIL ACTION**
v.	**:**	
WILMINGTON FINANCE, INC.	**:**	**No. 06-4176**

MEMORANDUM AND ORDER

Norma L. Shapiro, S.J. **December 13, 2006**

Plaintiffs, individually and on behalf of all other similarly situated employees of Wilmington Finance, Inc. ("WFI"), allege WFI has failed to pay overtime to plaintiffs in violation of the Fair Labor Standards Act, 29 U.S.C. §201 *et seq.* ("FLSA") and the Ohio Minimum Fair Wage Standards Act, OH ST §4111 *et seq*. Plaintiffs have filed a motion to proceed as a collective action and facilitate notice to similarly situated employees under 29 U.S.C. §216(b). For the reasons discussed below, this motion will be granted in part and denied in part.

I. Background

WFI provides lending services nationwide to consumers in connection with the purchase and refinance of real estate. Plaintiffs are current and former employees of WFI who have been employed as loan officers, account executives and other similarly-titled positions. Plaintiffs' complaint alleges WFI improperly classified its loan officers as exempt from the overtime requirements of the FLSA and Ohio state law. According to the complaint, plaintiffs have regularly worked more than 40 hours per week but have not been compensated for their overtime

hours. Plaintiffs estimate that "there are at least hundreds" of similarly situated loan officers subject to the same uniform job descriptions, policies, manuals, guidelines, scripts, standards and operational procedures. Plaintiffs seek monetary damages, declaratory and injunctive relief and other equitable and ancillary relief under the federal and state statutes.

WFI claims it has not improperly classified plaintiffs or other retail loan officers as exempt. It admits in its answer to the complaint that these employees have been classified as non-exempt. WFI denies that plaintiffs regularly worked in excess of 40 hours per week without overtime compensation and claims it paid plaintiffs appropriately for all overtime compensation. WFI denies this case is properly asserted as a collective action or that plaintiffs have a valid cause of action.

II. Motion to Proceed as Collective Action and Facilitate Notice

Plaintiffs, by this motion, request an order: (1) designating this case as a nationwide Section 216(b) collective action; (2) requiring WFI to produce a data file containing names, addresses and phone numbers of potential opt-in members; (3) authorizing notice to all similarly situated persons employed by WFI nationwide who were designated as account executives, loan officers or other similarly titled positions within the past 3 years; and (4) providing potential opt-in plaintiffs with 120 days notice to opt-in.

A. Legal Standards

The FLSA governs standard hourly wage practices; it generally requires employers to pay employees compensation at a rate of at least 1.5 times the regular rate when they work in excess of 40 hours per week. See 29 U.S.C. §207(1)(1). In the event of a violation of its provisions,

§216(b) of the FLSA allows one or more employees to pursue an action in a representative capacity for "other employees similarly situated".[1] This provision contains a special opt-in mechanism for joining claims and plaintiffs. Each employee who wishes to join the action must affirmatively consent to be a member of the action by filing written consent to that effect. See 29 U.S.C. §216(b). The statute of limitations is not tolled for any individual employee until he or she opts-in. See, e.g., Grayson v. K-Mart, 79 F.3d 1086, 1105-06 (11th Cir. 1996).

The Supreme Court has stated that "district courts have discretion...to implement [§216(b)] by facilitating notice to potential plaintiffs." Hoffman La-Roche, Inc. v. Sperling, 493 U.S. 165, 169 (1989). Before facilitating such notice, a district court must first find that it is appropriate for the action to proceed as an FLSA representative action. The burden is on the plaintiff to show that the proposed class satisfies two basic requirements: (1) class members must be "similarly situated"; and (2) all members must affirmatively consent to join the action. Aquilino v. The Home Depot, Inc., No. 04-4100, 2006 WL 2583563 at *1 (D.N.J. Sept. 7, 2006).

Section 216(b) does not define the term "similarly situated", but courts have developed a two-tiered test in making this determination. During the first stage, the court assesses whether notice should be given based on a limited showing that the employees are "similarly situated". At this stage, courts employ a relatively lenient evidentiary standard and generally examine the pleadings and affidavits of the parties to make this determination. Aquilino v. The Home Depot, Inc., 2006 WL 2583563 at *1; see generally Wright & Miller, §1807, "Collective Actions Under

[1]Section 216(b) states, "[a]n action to recover the liability prescribed [by the FLSA] may be maintained against any employer...by any one or more employees for and on behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought." 29 U.S.C. §216(b).

the FLSA" (2006 Update). Courts differ in the level of proof required at this first stage. Some courts have found that mere allegations in a complaint are sufficient; others have required some factual showing that the "similarly situated" requirement is satisfied. Bosley v. Chubb Corporation, No. 04-4598, 2005 WL 1334565 at *3 (E.D.Pa. June 3, 2005) (collecting cases). Whatever the standard of review at this preliminary stage, courts consistently find that the merits of plaintiff's claims need not be evaluated in order for notice to be approved and disseminated. E.g., Aquilino, 2005 WL 2583563 at *2.

If conditional certification is granted, notice is authorized, and the action proceeds to a second determination of whether plaintiffs are "similarly situated". During this second stage, usually after the completion of class-related discovery, the court conducts a specific factual analysis of each claim to ensure each plaintiff is an appropriate party. Bosley, 2006 WL 1334565 at *2. If final certification is not granted, the court decertifies the class, dismisses the opt-in plaintiffs without prejudice and permits any remaining individuals to proceed to trial. If final certification is granted, the action proceeds to trial on a representative basis. Wright & Miller, §1807 at p. 4.

B. Discussion

Plaintiffs' affidavits and exhibits show that WFI's loan officers in Cincinnati, Ohio share the primary duty of selling residential home loans. See Exhibits 1, 5-9, 15. They all receive the same written materials and are trained on the same topics; they are directed to present and sell loan proposals in the same format. Id. They are paid in the same manner, with a base salary of $1,066 per month. Plaintiffs' pay stubs show they are paid $533 bi-monthly based on 86.67 hours worked at $6.15 per hour. See Exhibits 10-12.

Opt-in consent forms have been filed on behalf of 14 loan officers in addition to the named plaintiffs. These individuals have stated that they: (1) worked for WFI as a loan officer in the Cincinnati, Ohio office; (2) worked in excess of 40 hours per week but were not paid overtime; (3) were familiar with the uniform duties, policies, training and directives that loan officers were required to follow; and (4) witnessed other loan officers who performed similar duties and worked more than 40 hours per week. See Exhibit 1 to Plaintiff's Motion. Five of these individuals submitted additional declarations in which they state that: (1) written time records were not always completed; (2) they were discouraged from recording all actual overtime hours worked and encouraged to falsify time sheets by recording less time than was actually worked; (3) they were paid the same amount regardless of the hours worked; (4) after a computer system was implemented, they were directed to log off the system in order to minimize the overtime hours worked. See Exhibits 6-9, 15.

Based on these exhibits, affidavits and declarations, plaintiffs have met their burden of showing there are other potential plaintiffs in the Cincinnati, Ohio office of WFI who are similarly situated to the named plaintiffs. However, plaintiffs seek to have this action certified as a nationwide collective action under §216(b). There is no evidence to support a collective action of this scope. Each named plaintiff and all 14 opt-in plaintiffs worked exclusively at WFI's office in Cincinnati and share many of the same supervisors. No evidence has been submitted to show that other loan officers in other geographic locations with different WFI supervisors have not been paid for overtime hours worked. Although the plaintiff must meet only a liberal standard for determining whether there are other "similarly situated" employees, there must be some evidence on which a reasonable inference about this could be made. See Haynes v. Singer

Co. 696 F.2d 884 (11th Cir. 1983) (no abuse of discretion when only evidence of "similarly situated" employees was counsel's unsupported assertions that FLSA violations were widespread and that additional plaintiffs would come from other stores owned by the employer); Bosley v. Chubb, 2005 WL 1334565 at *3-4 ("[p]laintiffs are required to provide some factual showing that the proposed recipients of opt-in notices are similarly situated to the named plaintiffs..."); Lawrence v. City of Philadelphia, No. 03-4009, 2004 WL 945139 at *2 (E.D.Pa. Apr. 29, 2004) (plaintiffs from different locations with different supervisors were not "similarly situated" under the FLSA). In fact, plaintiff has implicitly conceded in its complaint that the scope of the lawsuit is confined to Ohio; in its Rule 23 class action allegations, plaintiffs seek to represent a class of WFI loan officers "located in the state of Ohio." Complaint, ¶22. Based on the evidence submitted, only the loan officers employed at WFI's Cincinnati office share the same issues of fact surrounding their overtime claims.

WFI objects to the certification of any collective action, regardless of the scope. It contends that WFI has an unequivocal policy to pay all hourly employees for all time worked and against "off the clock" work. These policies may exist, but this is not proof that WFI complied with the applicable FLSA provisions. WFI also contends each individual's claim is different, and the court will have to assess each loan officer's practice with respect to recording hours and the reasons the appropriate hours were not recorded or paid for in the employee's paycheck. This fails to recognize that the WFI loan officers in the Cincinnati office share common supervisors and common questions of fact regarding these supervisors' instructions about recording time and falsifying time records.

A preliminary determination that a collective action is appropriate for the Cincinnati

office does not prejudice defendants. It may be revisited by a motion for decertification if it later appears, after appropriate discovery, that the additional plaintiffs who opt-in are not similarly situated. Aquilino, 2006 WL at 2583563 at *2 (citations and quotations omitted).

Accordingly, plaintiff has made a sufficient showing at this stage to warrant the conditional certification of a collective action under 29 U.S.C. §216(b) and to facilitate notice to the potential class of plaintiffs, which shall consist only of those current and former employees of WFI employed as loan officers, account executives or similarly-titled positions within the past three years at WFI's regional office located in Cincinnati, Ohio.

III. Form of Notice and Opt-In Consent

The parties each submitted a form of notice for the court's review. Upon consideration of each version, and after a conference call with the parties, the notice and opt-in consent in the form of Exhibit A to the attached order shall be submitted to the potential plaintiffs in the class. Among other provisions, this notice provides potential plaintiffs with 60 days from the date of the notice to opt-in to the action.

IV. Class Action Allegations

Pursuant to Fed.R.Civ.P. 23, plaintiffs also seek a state-wide class of similarly situated individuals comprised of all current and former loan officers located in the state of Ohio who worked more than 40 hours per week but did not receive overtime pay. Plaintiffs contend there are questions of law and fact common to the class, including whether the employees were improperly classified, whether they were entitled to overtime, whether they were expected to

work in excess of 40 hours per week and whether they were required to falsify their time records. Plaintiffs also allege typicality, adequate representation and that the action is properly maintainable as a class action under Rule 23.

The court expressed reservations at the hearing about the propriety of maintaining a collective action under §216(b) of the FLSA while simultaneously pursuing a state law class action claim under Fed.R.Civ.P. 23. The two approaches are seemingly incompatible in that §216(b) requires potential plaintiffs to opt-in to the lawsuit, while Rule 23 requires prospective party plaintiffs to opt-out upon notice of the action. See, e.g., Otto v. Pocono Health System, No. 06-1186, 2006 WL 3059924 at *1 (M.D.Pa. Oct. 27, 2006). No motion to dismiss or strike this count of the complaint is pending, so the court will defer ruling on this issue until such a motion is properly before it. In the interim, this count of plaintiffs' complaint is severed and stayed until resolution of the FLSA claim.

V. Conclusion

For the reasons discussed above, plaintiffs motion to proceed as a collective class action is granted insofar as it seeks conditional certification of a class comprised of all current and former employees of WFI's Cincinnati, Ohio office who were employed by WFI as loan officers, account executives or other similarly-title positions at that location during the past three years. Insofar as it seeks a class comprised of other WFI employees at other locations, it is denied. An appropriate order, which includes all discovery deadlines and other scheduling matters, will issue.

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v.	:	
WILMINGTON FINANCE, INC.	:	**No. 06-4176**

ORDER

AND NOW, this 13th day of December, 2006, upon consideration of plaintiffs' Motion to Proceed as a Collective Action, defendant's response thereto, and after an oral argument at which counsel for all parties were heard, for the reasons set forth in the accompanying Memorandum and Order, it is **ORDERED** that:

1. Plaintiffs' Motion to Proceed as a Collective Action and Facilitate Notice under 29 U.S.C. §216(b) (Paper #23) is **GRANTED IN PART and DENIED IN PART**. Insofar as the motion seeks conditionally to certify a collective action for all current and former employees of WFI who were employed as loan officers, account executives or other similarly-title positions by WFI at its Cincinnati, Ohio location during the past three years, it is **GRANTED**; insofar as the motion seeks conditionally to certify a collective action for any other employees of WFI, it is **DENIED**.

2. Count IV of plaintiffs' complaint, and the class action allegations attendant to this count, are **SEVERED and STAYED** until the resolution of the claims under the Fair Labor Standards Act, 29 U.S.C. §216(b).

3. WFI shall produce forthwith to plaintiffs a computer-readable data file containing the names, addresses and telephone numbers of all potential opt-in members of the conditionally certified class described above so that notice may be implemented.

4. The notice and opt-in consent in the form of Exhibit A hereto is **APPROVED** and **ADOPTED.** Plaintiffs are authorized to send this notice by U.S. first class mail to all members of the conditionally certified class to inform them of their right to opt-in to this lawsuit.

5. Any amendments to plaintiffs' complaint shall be filed on or before **March 15, 2007**.

6. All merits discovery shall be completed on or before **July 2, 2007.**

7. Any motion to decertify the class shall be filed on or before **July 2, 2007**.

8. Pretrial memoranda in accordance with Fed. R. Civ. P. 26 as amended, Local Rule 16.1(c), and the rules of this judge as stated in the Handbook of Pre-Trial and Trial Practices and Procedures of the United States District Court for the Eastern District of Pennsylvania (available from the Clerk of Court or the Philadelphia Bar Association or on-line at www.paed.uscourts.gov, under Judge Shapiro's procedures) shall be filed as follows:

Plaintiff - on or before **August 1, 2007**
Defendant - on or before **September 4, 2007**

Plaintiff shall propose stipulated facts in numbered paragraphs. Defendant shall state agreement or disagreement with each of plaintiff's proposed stipulated facts and may counter-propose stipulated facts in numbered paragraphs to which plaintiff is obligated to respond prior to the final pretrial conference.

9. Exhibits shall be submitted to chambers with the final pretrial memoranda. In accordance with Fed. R. Civ. P. 26(a)(3), listed exhibits shall be numbered and **premarked** for use at trial; no exhibits shall be listed unless they are already in the possession of opposing counsel. **Only listed exhibits may be used in the party's case-in-chief** except by leave of court.

As to documents listed in accordance with Fed. R. Evid. 803(6), as amended, notice in accordance with Fed. R. Evid. 902 (11) or (12) must be given no later than two weeks prior to the date the final pretrial memorandum is due.

10. All witnesses as to liability and damages should be listed. Only listed witnesses may testify at trial except by leave of court. Any party who intends to use deposition testimony at trial must submit deposition designations, counter-designations and objections in the final pretrial memorandum.

11. If it is believed that any additional discovery is necessary, it must be specifically requested, with the justification stated, in the pretrial memorandum.

Any other pretrial or trial matter requiring attention of the judge prior to trial, including but not limited to subjects for consideration at pretrial conferences listed in Fed. R. Civ. P. 16(c), shall be specifically addressed in the final pretrial memorandum.

Any motions for summary judgment or other pretrial motions must be filed on or before the due date of the moving party's pretrial memorandum; an answer to any such motion must be filed within the time provided by the Rules of Civil Procedure. No reply is contemplated. Oral argument on all motions will be heard at the final pretrial conference.

12. **Expert reports** in accordance with Federal Rule of Civil Procedure 26(a)(2) **shall be due for each party on or before the due date of that party's pre-trial memorandum**. If

the opposing party wishes to depose an expert, the deposition shall be taken before the final pretrial conference, unless otherwise ordered by the court. An expert's testimony at trial shall be limited to the information provided by the due date of a party's pretrial memorandum.

13. The final pretrial conference is scheduled for **October 9, 2007 at 2:00 p.m.** Trial counsel must attend. It is the responsibility of any trial counsel who cannot attend to contact the court as soon as any conflict becomes known so the court may consider rescheduling the conference. **Unless the court has otherwise granted permission, whoever attends the final pretrial conference will try the case.**

In addition to each trial counsel, the plaintiff and a representative of the defendant with full authority to settle the case shall attend. In the case of the defendant, a representative from defendant's insurance carriers, if any, shall also attend; both the representative of the defendant and the representative of the insurance carrier shall have the requisite settlement authority. Telephone availability is not acceptable unless leave of court has been granted. Failure to comply with this order may result in SANCTIONS in accordance with the Federal Rules of Civil Procedure.

14. This matter will be referred to the Honorable M. Faith Angell at the conclusion of discovery for the purpose of conducting a settlement conference.

15. This case will be placed in the jury trial pool on **October 10, 2007**, subject to call on 48 hours notice in accordance with the standing rule of this court as published in The Legal Intelligencer. On or before the date of trial, the parties shall submit points for charge and may submit proposed voir dire questions or jury interrogatories, preferably on a computer disk.

/s/ Norma L. Shapiro

S.J.